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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

ROSE JONES, Plaintiff and Appellant, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA et al., Defendants and Respondents.	A117180 (Alameda County Super. Ct. No. RG04-177074)

Plaintiff Rose Jones appeals the judgment following a jury verdict in favor of defendant Regents of the University of California (Regents) on her claim that employees of the University of California, Santa Cruz (University) violated the California Fair Employment and Housing Act (Govt. Code, §§ 12900, et seq.) (FEHA) when they took steps to block her employment at the University in retaliation for a prior lawsuit she had filed against the Regents and certain University employees. Jones contends that the trial court erred in three ways: (1) refusing to expressly instruct that failure to provide a job reference constitutes an adverse employment action; (2) allowing testimony regarding Jones's state of mind in applying for jobs at the University without having given (a) a limiting instruction, or (b) instructions to the jury on the subject; and (3) denying her motions for judgment notwithstanding the verdict and new trial. Jones also contends that the entire record warrants a new trial. We reject all arguments, and we affirm.

INTRODUCTION

Jones, an African-American woman, began working at the University in 1992 and over the years held various positions as described below. In 2001, she sued the Regents and others for retaliation and discrimination stemming from her termination from a job at the University's police department. Jones settled that lawsuit in 2003 for $400,000. Jones thereafter began submitting new applications for employment at the University, ultimately submitting 47 such applications. She was not hired for any position and filed this lawsuit, claiming the Regents retaliated against her for having filed the prior lawsuit.

The matter proceeded to trial before the Honorable Steven Brick, an experienced judge who, as the discussion below confirms, handled all issues in an especially thorough and conscientious fashion. Evidence was taken on 12 days, during which 27 witnesses testified and the parties introduced nearly 100 exhibits. Following vigorous closing arguments, the jury began deliberating on the afternoon of December 7, 2006, and returned with its special verdict the next day, finding against Jones. Specifically, the jury answered "yes" to the first two questions, that: (1) Jones did file and pursue a prior lawsuit against the University alleging discrimination, and (2) the University took adverse employment action against her. But they answered "no" to question number three: "Was Rose Jones's filing and pursuit of a prior lawsuit alleging discrimination a motivating reason for the University, acting through its employees, to take an adverse employment action against Rose Jones?"

Jones filed extensive motions for judgment notwithstanding the verdict (JNOV) and a new trial. Following opposition and reply, the motions were heard by Judge Brick, who entered detailed orders denying both motions.

Despite the fact that the JNOV motion implicates the substantial evidence rule (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 546), necessitating that the evidence must be viewed in the light most favorable to the Regents (*Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 769); and despite that Jones's claims of instructional error must be viewed in light of all the evidence in the case (*Soule v. General Motors Corp.* (1994)

8 Cal.4th 548, 572 (*Soule*)), one can read Jones's 14-page "Statement of Appealability" and "Procedural and Factual History" and never learn that there was any evidence supporting the Regents' version of what occurred—evidence the jury obviously believed. Such conduct is not to be condoned.

California Rules of Court, rule 8.204(a)(2)(C) provides that an appellant's opening brief shall "[p]rovide a summary of the significant facts . . . ." And the leading California appellate practice guide instructs appellants about this: "Before addressing the legal issues, your brief should accurately and fairly state the critical facts (including the evidence), free of bias, and likewise as to the applicable law. [¶] Misstatements, misrepresentations and/or material omissions of the relevant facts or law can instantly 'undo' an otherwise effective brief, waiving issues and arguments; it will certainly cast doubt on your credibility, may draw sanctions [citation], and may well cause you to lose the case!" (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2008) ¶9:27, p. 9-8, italics omitted.) Jones's brief does not measure up.

Jones's brief also ignores the precept that all evidence must be viewed most favorably to the Regents and in support of the judgment. (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925-926; *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) What Jones attempts here is merely to argue the "facts" as she would have them, an argumentative presentation that not only violates the rules noted above, but also disregards the admonition that appellants are not to merely reargue facts or "merely reassert [their] position at . . . trial." (*Conderback, Inc. v. Standard Oil Co.* (1966) 239 Cal.App.2d 664, 687; accord, *Albaugh v. Mt. Shasta Power Corp.* (1937) 9 Cal.2d 751, 773.) In sum, Jones's brief manifests a treatment of the record that disregards the most

fundamental rules of appellate review. (See 9 Witkin, California Proc. (5th ed. 2008) Appeal § 365, pp. 421-423, and § 368, pp. 425-426.)[1]

BACKGROUND

Jones's General Employment Background

In August 1992, Jones began working at the University police department. At some point, she felt that one of her co-workers was making racially offensive remarks, and filed a complaint with the affirmative action office. The comments did not stop, however, and Jones began to feel that the University's chief of police was retaliating against her for having filed the complaint.

In 1999, Jones was terminated for misconduct stemming from her dismissing numerous parking citations received by her mother and other family members. Believing that she had actually been terminated in retaliation for having filed the prior complaint, Jones appealed the decision. In February 2000, an independent internal auditor investigated Jones's termination, and concluded that she had abused her position of authority by dismissing parking tickets for her family members. The termination was upheld.

The auditor also found that Jones had made misrepresentations on her initial employment application by failing to disclose a 1980 welfare fraud conviction, and that she had provided a reference for her daughter that falsely implied her daughter had worked for the police department. According to Jones, the auditor told her she was required to disclose the fraud charge on any employment application she filled out, and that she could be fired if she was not totally truthful on her applications.

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[1] The Regents' brief is likewise deficient, but in a different way: it does not even contain a factual recitation. While this is perhaps not required in a respondent's brief, it is certainly advisable, as Eisenberg also makes clear. (Eisenberg et al., *supra,* ¶9:27, p. 9-8.) While there are a few facts scattered throughout the Regents' skeletal brief, most are devoid of any supporting citation to the record, in violation of California Rules of Court, rule 8.204(a)(1)(C). The Regents' brief has provided at best minimal assistance in analyzing the issues raised on appeal.

Meanwhile, prior to her termination from the police department, Jones had been hired as a preceptor at Kresge College at the University.[2] It was an unpaid position, but one that provided her with a free apartment. Arlyn Obsorne, a residential housing coordinator, was her supervisor. Jones continued to work as a preceptor after her termination from the police department. She was also hired for two other positions, as the assistant to Carolyn Harper, the college administrative officer (CAO), and as an on-call proctor at Kresge College, where her supervisor was Karen Rosewood.[3]

In the fall of 1999, about two months after Jones began working as Harper's assistant, Harper left the CAO position, and was ultimately replaced in January 2000 by Anita Diaz. In March 2000, Diaz informed Jones that she no longer needed an assistant and that her position was being eliminated. Jones was let go the following month. She again filed a grievance with the University, claiming that this was another act of retaliation, this time relating to the friendship between Diaz and the University's chief of police. The same month that Jones was let go from the assistant-to-the-CAO position, her hours as an on-call proctor were eliminated. The next month, May 2000, Osborne notified Jones that she was not going to be reappointed as a preceptor once her term expired on June 30.

Since all of her employment with the University was terminating, Jones began applying for "lots" of jobs posted on the University's website, submitting applications for approximately 30 positions in one month alone. As Jones described it, she made a "template" that detailed her job history and experience, which she then copied into each application, which now disclosed the prior welfare fraud conviction. Some of the jobs for which she applied were preceptor positions, and Osborne and Rosewood both wrote

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[2] Jones described a preceptor as "a dorm mother" who helps students resolve issues and tries to make them feel at home.

[3] The proctors oversaw the safety of students by making rounds, ensuring that buildings were secure, stopping unauthorized parties, and getting help for injured students.

positive letters of recommendation on her behalf. In June 2000, Jones was hired for a position at the University's Disability Resource Center (DRC). The job was not year-round, however, and Jones was often "furloughed," so that she did not work during the summer months.

The First Lawsuit

In January 2001, while still employed at the DRC, Jones filed a lawsuit against the Regents (and apparently others), alleging that she had been the victim of harassment, discrimination, and retaliation.[4] In July 2003, Jones agreed to settle the lawsuit for $400,000, and the Regents approved the settlement the following month.

The Employment At Issue Here

In August 2003, shortly after receiving her portion of the settlement,[5] Jones began applying for various positions at the University, submitting applications for approximately 47 full- and part-time jobs over the following seven months. As before, she created a template which she duplicated for each application. She again checked the "Yes" box in response to whether she had ever been convicted of an offense, this time stating, "I was convicted of welfare fraud in 1980 in Fresno, CA, which was expunged by the Court under the law in 1982, and under the expungement law may not be considered for employment purposes. This expunged conviction was unlawfully used by UC after investigation by UC Internal Audit. A lawsuit followed, resulting in a settlement with UC of $400,000. Also a DUI in Salinas, CA June 1997."[6]

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[4] Though there were apparently other named defendants in the lawsuit, it is unclear from the record who they were. Rosewood's testimony suggests that Diaz was one of them.

[5] Jones apparently received only $80,000 of the settlement funds, with the remainder going to attorneys' fees as well as debts Jones owed in a bankruptcy proceeding.

[6] Jones was charged with welfare fraud in 1980. She served "a few weekends in jail" and made restitution, after which the charges were dismissed. It was her understanding that because the charges were dismissed, she could answer in the negative if asked whether she had ever been convicted of a felony.

Where the applications sought a summary of the qualifications and background that supported her application, Jones related her relevant employment experience and skills, and then concluded with the following paragraph: "I was terminated from my UC Police Department position in 1999 for discriminatory reasons, and a few UC managers took efforts to have me blackballed from employment with UC when I complained of the discriminatory termination. As a result of the blackballing efforts, my Assistant to the College Administrative Officer position with Kresge College was eliminated for false reasons, and I was terminated from the Kresge College Proctor and Preceptor positions. Despite the efforts to blackball me, my immediate supervisors felt that my actual performance in all aspects of my work in these positions was very good, or exceptional, and supported my lawsuit for discrimination and retaliation, which resulted in a settlement with UC in the amount of $400,000."[7]

From these 47 applications, Jones received two interviews. The first was for a job in the facilities department, which she was not offered. This job is apparently not part of Jones's contentions on appeal. Two other positions are, and we discuss them in some detail.

The Relief Proctor Position, and Rosewood's Role

Jones applied for a part-time relief proctor position at Kresge College, the selection committee for which was chaired by Jimmie Brown, a senior supervising proctor who was himself supervised by Rosewood. During the hiring process, Brown attempted to obtain references from contacts provided by Jones, but encountered difficulties. While Osborne did provide a reference, Kresge CAO Diaz informed him that she would not, and interim Kresge CAO Janey Davis (who served as interim CAO before Diaz was hired) never returned his telephone calls.

[7] In her opening brief, Jones asserts that, "On her applications Jones was required to list prior positions with the University and the reasons for leaving. Jones stated she had left those prior positions due to retaliation, had sued and recovered on the suit." As is apparent, that is a less-than-complete portrayal of the applications.

Brown told Rosewood that he was unable to obtain references from the contacts provided by Jones and asked if Rosewood, who had supervised Jones when she served as an on-call proctor, would be a reference. Rosewood declined, and her declination is at the heart of Jones's claim, whose brief selectively quotes from Rosewood's testimony, with several portions set forth in boldface.

In light of Jones's focus on Rosewood's testimony, we set it out in its entirety—all of her testimony on the subject, at all points in the trial at which it was given or read. It was as follows:

Under examination by counsel for Jones as an adverse witness pursuant to Evidence Code section 776, Rosewood first testified as follows:

"Q: It is true that you told Jimmie Brown that you preferred not to provide a reference for Rose Jones, and that you would probably decline to be a reference for Rose Jones?

"A: That is correct. [¶] . . . [¶]

"Q: Is it true that if Rose Jones had never brought the lawsuit of discrimination against the University to include Anita Diaz, if she had never done that, that you could have provided a reference to Rose Jones for Jimmie Brown?

"A: Yes, I believe that could be true.

"Q: And is it true that if Rose Jones had never brought the lawsuit against the University, including Anita Diaz, that you could have given Jimmie Brown a positive reference for Rose Jones being a proctor? [¶] . . . [¶]

"A: I believe I could have."

Shortly thereafter Rosewood was asked by counsel for the Regents to explain in "her own words" her concern about providing a reference for Jones. Rosewood replied: "In my own words, I felt that I could no longer be a reference to Rose Jones because I wasn't sure about the motivation any longer. What she was doing with her application, why she had inserted a statement, willingly, into an application, that confounded me, in my mind. And I thought, truthfully, used poor judgment by placing that in her

application. And I didn't—I didn't want to be in the middle of something that I didn't understand, so I didn't feel that I could at that point ethically provide the same reference that I could have provided as I had before."

On recross-examination by Jones's counsel, the following ensued:

"Q: Why do you think that Rose Jones, after you talked to [human resources], why did you question Rose Jones putting this information in her application?

"A: After [human resources] informed me that that was not something that she was required to do, I felt that she was doing that as a legal maneuver.

"Q: So, do you think that Rose Jones, who you worked with these—all those years, was simply putting in the disclosure that she was terminated, filed a lawsuit, in that material, in order to set the University up for another lawsuit? [¶] . . . [¶]

"A: Yes, I did.

"Q: And you didn't want someone working in Kresge College that you thought might be trying to set the University up for another lawsuit, correct?

"A: No, I don't want anyone setting anyone up for anything, that's true."

Then, on further examination by counsel for the Regents, there was this:

"Q: Did you have a problem with judgment with Ms. Jones? [¶] . . . [¶]

"A: Yes, I did.

"Q: Okay. And can you . . . explain the issue of judgment that you had with Ms. Jones?

"A: That I felt by the addition of her statement in the job application, that it used poor judgment, that it would have an emotional impact, an intended emotional impact on people reading the application. To me that showed a certain level of lack of judgment in an applicant, applying for a position."

Finally, during Brown's testimony, counsel for Jones read the following passage from Rosewood's deposition:

"Q: Does Jimmie Brown ever say, 'Knock, knock, Karen. It's time for me to talk with you as far as Rose Jones reference wise?

"A: Didn't put it that way, but he did ask me if I could be a reference for her.

"Q: And tell me about that discussion.

"A: And I said I feel like I would prefer not to. And that's probably not the words I chose, but I said I would probably decline to be a reference for Rose.

"Q: And why was that that you told him when he asked you if you'd be a reference that you told him in some form of words you didn't really want to?

"A: Correct.

"Q: Why was that?

"A: That was because I felt that I was in a position that I don't know that I could have given a fair and wholly unbiased reference to Rose at that—or for Rose at that time. Possibly or likely in my mind going back to that sort of split thinking about this whole involvement that she was in, this involvement with suing the University and Anita Diaz and so forth, so I didn't feel that I could give an impartial reference to Rose at that point, I really didn't, so I declined to do it. [¶] . . . [¶]

"Q: Did you inform Jimmie Brown when he asked you if you would be a reference that the reason you didn't want to give a reference was because you didn't think you could be impartial and you would be adversely biased in relation to Rose Jones?

"A: No. I did not share all of that with Jimmie.

"Q: Is it correct that what I've just described is something like what you thought when you said, no, I won't tell him, or, I won't give him a reference?

"A: Correct. I did not feel that I could give an impartial reference at that point to Rose.

"Q: And the reason that you felt personally that you could not give an impartial unbiased reference for Rose to Jimmie Brown for the Kresge relief proctor position that was open was because of Rose Jones making the complaint of discrimination and retaliation and you being personally torn about the merits of it?

"A: I don't know that I would have framed it that way to myself, that it was due to uncertainty of merits of the case. I would say that I felt that I could not give the same

kind of response had it been two years prior to being requested for a reference for Rose because there was a lawsuit involved that involved Rose, somebody I thought highly of, Anita Diaz and other people who I also felt highly of, and I had not determined what was what frankly, so I did not want to put myself in a position to say—I just felt like I couldn't say because I felt like I was absent of information that would allow me to say absolutely 100 percent she is great in every regard, go forward."

We pause from recitation of the evidence to note that Rosewood's testimony is not only crucial to Jones's appeal, it was the focal point of her post-trial motions. And in resolving those motions, Judge Brick—who had the opportunity to hear what Rosewood said and interpret it as well as anyone—said this: "With respect to Rosewood's testimony concerning the Proctor position, Plaintiff misreads Rosewood to say that it was because of the prior lawsuit that she declined to give a reference. However, the jury could find, based upon all of Rosewood's testimony that the lawsuit, per se, was not a motivating factor in her decision. Rather, the jury could find that it was the nature of Jones' claims against Anita Diaz and others which caused Rosewood to doubt Jones, and thus not be able to give her a 100% positive reference anymore."

Rosewood's testimony cannot be interpreted favorably to Jones, not in light of the rule of conflicting inferences, which requires us to indulge all inferences that may reasonably be deduced from the facts in support of the Regents, the prevailing party below. (*Estate of Bristol* (1943) 23 Cal.2d 221, 223.)[8] Rosewood's testimony does not avail Jones. And other testimony is devastating.

Brown, the person in charge of the hiring process for the proctor position Jones sought, testified that he in fact interviewed Jones, and the fact that she had only one positive reference was *not* a factor in the decision-making process. To the contrary,

[8] Bolstering the credibility of Rosewood's testimony that she declined to provide a reference because of the manner in which Jones completed the application was the fact—confirmed by both Jones and Rosewood—that Rosewood had provided a positive reference for Jones for her first proctor position, a reference Rosewood gave *after* Jones had already filed her lawsuit against the Regents.

Jones's application was problematic because she already had a University job, and proceeding with Jones would have adversely affected his budget, as he would have had to pay her overtime. In any event, Brown explained, he hired the better candidate.

The On-Call Proctor Position and the Testimony of Thais Bouchereau

The other position for which Jones applied—and the second position at issue here—was a part-time, on-call proctor position, which she applied for while working full time in the DRC.[9] As to this position, the focus of Jones's case was the testimony of Thais Bouchereau, the coordinator for residential education (CRE) at Merrill College and who, at the request of Merrill College assistant CAO Valerie Chase, chaired the selection committee for the vacant proctor position (which had replaced the preceptor positions, which had been phased out).

Jones was introduced to Bouchereau in late March or early April 2004, and testified about a conversation in which Bouchereau told her that Chase had ordered her to make sure that Jones did not get an interview because of her prior lawsuit against the University. According to Jones, Bouchereau said she felt it was wrong but did as instructed. Jones did not get an interview.

Bouchereau's testimony was similar. According to her, at some point during the hiring process, Chase told her that Jones had filed a lawsuit against the University and that Bouchereau was to take action to ensure that Jones did not move forward in the process because she, Chase, did not want to be set up. Bouchereau explained how she carried out Chase's directive.

Chase also testified at trial, and her testimony directly contradicted that of Jones and Bouchereau, flatly denying that she told Bouchereau to prevent Jones from moving

[9] Jones understood that if she retained her job at the DRC and was hired for the on-call proctor job, she would exceed 100 percent time and would have to be paid overtime. This, of course, would cost the University more than hiring someone else who was comparably situated.

forward in the interviewing process. Chase's testimony could not have been more directly contrary, as illustrated by this passage:

"Q: Did you tell Thais Bouchereau not to move Rose Jones's application forward to the interview stage, because she had brought a lawsuit against the University?

"A: No, sir."

Chase's deposition testimony, read during Bouchereau's testimony, was consistent:

"Q: Did you instruct Thais Bouchereau that Rose Jones's application was not to go to the interview stage?

"A: I did not."

Chase did testify that when she received the applications from the human resources department, that of Jones caught her eye because it mentioned that she had been involved in a lawsuit against the Regents; she also said she told Bouchereau she was concerned about Jones's application because of the prior lawsuit. However, she not only denied that she told Bouchereau not to move Jones's application forward to the interview stage, she also told Bouchereau that they were to treat Jones like any other applicant in the pool. In light of this, we are at a loss to understand how Jones can call Bouchereau's testimony undisputed, let alone "uncontradicted admissions."[10]

In April 2004, Jones contacted the University's employee assistance program because she felt like she was "falling apart," and was referred to a therapist. After a few sessions, the therapist called the police, who hospitalized Jones on a 72-hour hold for fear she was suicidal. In April 2004, after further counseling and hospital stays, Jones resigned from her employment at the DRC.

[10] Bouchereau's testimony was not only flatly contradicted by that of Chase, it was undercut by the fact that Bouchereau was impeached on many occasions with prior inconsistent testimony from her deposition. Bouchereau also admitted she was disappointed with her relationship with the University, manifesting a bias.

The Second Lawsuit

On September 24, 2004, Jones filed this action, and on August 22, 2005, the amended complaint at issue here. It named as defendants the Regents, Joseph P. Mullinix, senior Vice President of Business and Finance in the Office of the President, and Patrick Reed, the University Auditor in the Office of the President. The complaint alleged five causes of action, all asserting retaliation: (1) failure to take all reasonable steps necessary to prevent discrimination, including discrimination in the form of retaliation (Govt. Code, § 12940, subd. (k)); (2) retaliation (Govt. Code, § 12940, subd. (h)) ; (3) retaliation (Govt. Code, § 12940, subd. (h)); (4) retaliation (Govt. Code, § 8547.10); and (5) retaliation (Govt. Code, § 8547.10).

Each of the three defendants filed separate but substantively identical answers, denying Jones's allegations and asserting numerous affirmative defenses. The case in fact went to the jury on a single claim of retaliation.

ANALYSIS

A. Retaliation Claims Under FEHA

FEHA protects employees against retaliation for filing a complaint or participating in proceedings or hearings under the act, or for opposing conduct made unlawful by the act. (Gov. Code, § 12940, subd. (h).) As is relevant here, Government Code section 12940, subdivision (h) makes it unlawful "[f]or any employer . . . to discharge, expel, or otherwise discriminate against any person . . . because the person has filed a complaint, testified, or assisted in any proceeding under this part." (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 472.) This is known as the "participation" clause of FEHA. (See *Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 155, fn. 16.)

As explained by our Supreme Court, in order to prevail on a claim for retaliation under the participation clause, an employee must establish three elements: (1) that he or she engaged in a "protected activity"; (2) that the employer subjected the employee to an adverse employment action; and (3) a causal link between the protected activity and the

employer's action. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042; *Sada v. Robert F. Kennedy Medical Center, supra*, 56 Cal.App.4th at pp.155-156.)

B. Judge Brick Did Not Err in Instructing the Jury Regarding Adverse Employment Action

1. Background

Jones first contends that Judge Brick erred in refusing to expressly instruct the jury that failing to provide a job reference is an adverse employment action and that she was prejudiced by this refusal. There was no error.

By way of background, the parties submitted competing jury instructions on retaliation, including what constitutes an adverse employment action in the context of a FEHA retaliation claim. In fact, Jones herself submitted two different proposed instructions on the issue, one of which, submitted on November 13, 2006, required her to prove as an element of her retaliation claim that the Regents "failed to give equal consideration to Plaintiff Rose Jones in making employment decisions. These employment decisions include deciding who to select for interview, or who to hire, or who to give positive job references to."

Prior to hearing argument about instructions, Judge Brick issued a four-page, single-spaced order entitled "instructions and tentative rulings on proposed jury instructions." Then, during a November 20, 2006 hearing on jury instructions, Judge Brick heard lengthy argument on the retaliation instruction. He declined to instruct the jury on Jones's proposed instruction, explaining: "Well, my take on that is the Plaintiff's phrasing is unduly argumentative. But while each of those activities [failure to interview, hire, or give a positive job reference] can be an adverse employment action, it is really up to the jury to decide, based upon the evidence that they have heard about how the process works, whether a decision not to select from [*sic*] interview was an adverse employment action in this case. Whether a decision not to hire, whether a decision not to give a reference was an adverse employment action in this case. And whether going down to

the further language in the instructions, whether any of those were motivated, all right, retaliatory motive."

Questioned by Jones's counsel about this statement, Judge Brick further explained, "I don't have a problem with the hiring decision as being an adverse employment action. I don't have a problem with the interview decision being an adverse employment action. I have a problem with giving a positive job reference always being—because if it is in here the way you have written it that implies that the law says failure to give a positive job reference is always an adverse employment action."

After further argument, Judge Brick proposed an instruction that would state in relevant part, "[T]he Court advises the jury that a failure to promote and a failure to provide an interview in connection with the job application are adverse employment actions. [¶] The Court advises you that failure to give a positive job reference may or may not be an adverse employment action." Additional discussion followed, after which it appears that the parties agreed on the language that would be used, with Judge Brick congratulating them on having resolved the dispute.

While not clear from the record—and not addressed by either party—it appears that the parties were subsequently unable to craft a mutually agreeable retaliation instruction consistent with the discussion before Judge Brick. So, both parties submitted

another retaliation instruction, this time derived from CACI 2505.[11] Jones's proposed instruction provided that as an element of her claim she had to prove that the Regents "committed an adverse employment action against Plaintiff Rose Jones." And it went on to define that term as follows: "An adverse employment action is an action that materially affects the terms and conditions or privileges of employment. Under the law, the Court finds and instructs that a failure to hire or a failure to interview in connection with a job application are each adverse employment actions. The Court advises the jury that failure to give a positive job reference may or may not be an adverse employment action. The jury is to decide whether the failure to give a positive job reference in this case was reasonably likely to impair Rose Jones' prospects for promotion or advancement. If you find that the failure to give a positive job reference in this case was reasonably likely to impair Plaintiff's prospects for promotion or advancement, then that conduct is an adverse employment action."

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[11] CACI 2505 provides: [Name of plaintiff] claims that [name of defendant] retaliated against [him/her] for [describe activity protected by the FEHA]. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of plaintiff] [describe protected activity];

2. [That [name of defendant] [discharged/demoted/[specify other adverse employment action]] [name of plaintiff];]

[or]

[That [name of defendant] engaged in conduct that, taken as a whole, materially and adversely affected the terms and conditions of [name of plaintiff]'s employment;]

3. That [name of plaintiff]'s [describe protected activity] was a motivating reason for [name of defendant]'s [decision to [discharge/demote/[specify other adverse employment action]] [name of plaintiff]/conduct];

4. That [name of plaintiff] was harmed; and

5. That [name of defendant]'s conduct was a substantial factor in causing [name of plaintiff]'s harm.

The Regents also submitted a proposed instruction derived from CACI 2505, defining an adverse employment action as "a failure to hire or interview for a given position for which the plaintiff is qualified and/or an action that materially affects the terms, conditions, or privileges of employment. Adverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotions is action that materially affects the terms and conditions or privileges of employment."

Rather than adopt either of the instructions proposed by the parties, Judge Brick modified CACI 2505 to define an adverse employment action as "an action that materially affects the terms and conditions, or privileges of employment, including without limitation, a failure to hire, a failure to interview in connection with a job, and/or any other action that is likely to impair a reasonable employee's job performance or prospects for advancement or promotion."[12] This is the instruction he gave to the jury.

2. The Law

Jones now argues that Judge Brick's refusal to instruct that the failure to provide a job reference is an adverse employment action "was contrary to the law, prejudicial, not cured by other instructions and requires reversal of the judgment and a new trial." Her argument begins as follows: "1. Standard–Refusal To Give Jury Instruction [¶] In reviewing the jury instructions refused by the Trial Court this appellate court is required to view the evidence in the light most favorable to Appellant's claim of instructional error. *Sill[s] v. Los Angeles Transit Lines* (1953) 40 Cal.2d 630, 633. Stated another way, the appellate court must assume that the jury might have rendered a verdict in favor of appellant on those issues as to which it was misdirected. *Henderson v. Harnis[c]hfeger Corp.* (1974) 12 Cal.3d 663,674."

[12] Jones claims in her opening brief that Judge Brick gave the instruction proposed by the Regents. As is apparent, the proposed instruction submitted by the Regents and that given by Judge Brick were different.

These principles are not the standard of review. They are, rather, principles that a court is to apply if the instruction refused was a proper instruction—which Jones has not demonstrated here.

The correct standard of review is well settled. It is this: "[T]here is no rule of automatic reversal or 'inherent' prejudice applicable to any category of civil instructional error, whether of commission or omission. A judgment may not be reversed for instructional error in a civil case 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' (Cal. Const., art. VI, § 13.) . . . . [¶] [W]hen deciding whether an error of instructional omission was prejudicial, the court must also evaluate (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." (*Soule, supra,* 8 Cal.4th at pp. 580-581, fn. omitted.) And for Jones to prevail on a claim of instructional error, she must show "that the error was prejudicial (Code Civ. Proc., § 475), resulting in a 'miscarriage of justice.' (Cal. Const. art. VI, § 13.) A 'miscarriage of justice' occurs when it is ' ". . . reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." ' [Citation.]" (*Lundy v. Ford Motor Co*. (2001) 87 Cal.App.4th 472, 479.) No such miscarriage is shown here—indeed, no error.

To begin with, the instruction given was an accurate statement of law. (See *Yanowitz v. L'Oreal USA, Inc., supra,* 36 Cal.4th 1028; CACI 2505.)

The instruction proposed by Jones was, as Judge Brick observed, argumentative, as it emphasized a certain fact. As such, it was properly rejected. (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 718.) " 'Instructions should state rules of law in general terms and should not be calculated to amount to an argument to the jury in the guise of a statement of law. [Citations.] Moreover, it is error to give, and proper to refuse, instructions that unduly overemphasize issues, theories or defenses either by repetition or singling them out or making them

unduly prominent although the instruction may be a legal proposition. [Citations.]' [Citation.] Finally, '[e]rror cannot be predicated on the trial court's refusal to give a requested instruction if the subject matter is substantially covered by the instructions given.' " (*Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1217; accord, *Maxwell v. Powers* (1994) 22 Cal.App.4th 1596, 1607.)

But even assuming *arguendo* Jones's instruction should have been given, she cannot prevail, as she cannot demonstrate that if the jury had been instructed as she requested, the verdict would have been in her favor. She has not demonstrated an error so prejudicial that a miscarriage of justice occurred. (*Soule, supra,* 8 Cal. 4th at p. 574; *Mendoza v. Club Car, Inc.* (2000) 81 Cal.App.4th 287, 306.) This is so for multiple reasons.

First and foremost, the jury *found* that the Regents subjected Jones to an adverse employment action. Jones dismisses the significance of this finding, arguing, "The Jury found that there was an adverse action but did not find that Jones's participation in the prior lawsuit was a motivating factor. . . . [T]here is nothing in the response by the jury to verdict form question No. 2 to the effect that the refusal to provide a job reference was considered by the jury to be an adverse action." By the same token, there is nothing in the verdict showing that the adverse employment action found was not—or at least did not include—Rosewood's failure to provide a reference. Indeed, a substantial portion of the testimony concerned Rosewood's refusal to provide a reference for Jones. Again, the rule of conflicting inferences defeats Jones. (*Bristol, supra,* 23 Cal.2d at p. 223.)

Second, Jones's argument that if the jury had been instructed per her request, it would necessarily have found "that the prior participation of Jones in discrimination lawsuit motivated Rosewood to refuse to provide a reference" is pure speculation. Not only is such assertion based on the myopic reading of Rosewood's testimony discussed above, it is belied by the record. As part of the retaliation instruction, Judge Brick instructed that Jones had to prove that her pursuit of the prior lawsuit "was a motivating reason for the adverse employment action, meaning it was something that moves the will

and induces action even though other matters may have contributed to the taking of the action."[13] The jury expressly found against Jones on this.

Third, the definition of adverse employment action read to the jury was broad enough to encompass failure to provide a reference. Jones disputes this, arguing that the catch-all phrase was limited to " 'or any other action that is likely to impair a reasonable employee's job performance or prospects for advancement or promotion.' " This argument is less than candid, especially in light of what occurred at trial. Specifically:

After defining adverse employment action as quoted above, the instruction offered examples, "including without limitation, a failure to hire, a failure to interview in connection with a job, and/or any other action that is likely to impair a reasonable employee's job performance or prospects for advancement or promotion." More significantly, that a failure to provide a reference was within the definition *was expressly argued by Jones's counsel*. Thus, the opening closing argument:

"Now there is one where the Court's instructions are asking you to look at the facts and look at the instruction, and that is right here where the Court says: And/or any

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[13] Though neither party addresses the issue, we note that this instruction—that the prior lawsuit was "a motivating reason"—set out a legal principle more favorable to Jones than that which would apply under federal law. That is, a leading treatise states that "[s]everal courts hold that Title VII's 'mixed-motive' provision (42 USC §2000e-2(m)) (under which liability for *discrimination* may be imposed where an improper motive was one of several motives, ¶7:485) does *not* apply in retaliation cases. Thus, where *other grounds* exist for the employer's action (e.g., poor job performance), the fact that the employer may have also had an improper motive (e.g., to retaliate) is not enough to impose liability for retaliation. Rather, it must be shown that the improper motive had a *determinative effect* on the action taken." (Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2008) § 7:840, p. 7-135, citing *Woodson v. Scott Paper Co.* (3rd. Cir. 1997) 109 F.3d 913, 932; and *Tanca v. Nordberg* (1st Cir. 1996) 98 F.3d 680, 682-684.)

California courts often look to federal Title VII authorities for guidance in construing California's FEHA scheme. (*Flait v. North American Watch Corp*. (1992) 3 Cal.App.4th 467, 475-476; *University of Southern California v. Superior Court* (1990) 222 Cal.App.3d 1028, 1035; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 606.)

other action that is likely to impair a reasonable employee's prospects for advancement or promotion. That is an adverse employment action, also.

"What have we here in this case? Evidence that could possibly be something that would adversely affect Rose Jones's chances for getting a job? And what we have has to do with references.

"I'll be talking a bit about this, but the references would be Karen Rosewood, a supervisor for three years, thought Rose Jones had done great, but won't give a reference for Rose Jones; that she won't give a reference because Rose Jones had brought the prior lawsuit.

"And what does Jimmie Brown tell us about that? Jimmie Brown and the notes of Lori Castro, the notes of Lori Castro. Issues came up regarding references and Jimmie Brown wants to back out of hiring Rose Jones.

"What have we heard from the University consistently? They are looking for people before they get hired for reference checks to be done, and if you can't get a positive reference, you're done. You don't get the job. And that's—the reference-checking aspect for Rose Jones is part of why she gets out of the loop on the on-call proctor position."

The closing argument made the same point: "That is not only misleading in that area, but today in closing, Mr. Lafayette [counsel for the Regents], when talking about adverse action, you only heard him talk about adverse action as if it was the hiring decision. Adverse action. Remember him always saying: Well, we hired the best person. Why just focus on that? [¶] What did the instructions tell you are the adverse actions? No. 2, failure to hire. Correct. Adverse action, failure to interview. And there is a real important reason why there are multiple aspects that are adverse actions. [¶] Because if you find that Rose Jones was not interviewed . . . ."

From there, counsel went on for two more pages arguing about the failure to "interview" and its effect, in fact mentioning "interview" or "interviewed" no fewer than ten times, culminating with this: "So there's a real reason why, in the closing, this part in

No. 2 was totally avoided, and the focus was only on hiring, because Mr. Lafayette tried to misdirect you and, effectively turn the burden back on us to say: Hey, she would have been hired. No. The law is: You, the employer, have done something bad. You have retaliated and kept her from the interview stage. Now the burden is on you, and if you can't prove it, the jury has to award the damages."

Lastly, we note that Jones proposed the "prospects for advancement or promotion" language herself, her second proposed retaliation instruction reading in pertinent part as follows: "The jury is to decide whether the failure to give a positive job reference in this case was reasonably likely to impair Rose Jones' prospects for promotion or advancement. If you find that the failure to give a positive job reference in this case was reasonably likely to impair Plaintiff's prospects for promotion or advancement, then that conduct is an adverse employment action." Thus, by Jones's reasoning, her own proposed jury instruction was not broad enough to encompass Rosewood's failure to provide a job reference. Where a party provides or consents to the language used in the instruction, the party cannot be heard to complain about it later. (*Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565, 573.)

C. There Was No Error Regarding Jones's State of Mind

Jones's second argument concerns evidence of her so-called state of mind or motivation. This issue arose below on three separate occasions: first, on Jones's motion for summary adjudication on the Regents' affirmative defenses; second, on her motion in limine; and third, when she submitted two proposed jury instructions. Jones now argues that the rulings adverse to her erroneously "allowed extensive evidence and argument about the state of mind of Jones, and the refusal to give a limiting instruction or jury instruction on the limited use of such testimony prejudicially impacted the outcome of the trial requiring reversal and remand for a new trial." We are not persuaded.

1. Motion for Summary Adjudication

In May 2006, Jones moved for summary adjudication on all 32 of the Regents' affirmative defenses.[14] The Regents filed opposition, and Jones a reply. After a short continuance to allow for the completion of discovery, the motion came on for hearing before the Honorable Frank Roesch. The resulting order granted Jones's motion as to 20 of the affirmative defenses. Numbers seven and 24 were not among them.

Affirmative defense number seven asserted that "[T]o the extent [Jones] engaged in any conduct that can be construed as a protected act under the law, she did so in bad faith." Affirmative defense number 24 asserted that Jones "acted in bad faith by her filing applications for positions with Defendant and inserting certain inflammatory and untrue claims and/or information in her applications so that she could pursue this action for unlawful retaliation."[15] Jones's motion argued that her good or bad faith conduct was not an element of her retaliation claim and therefore not a valid defense. Judge Roesch rejected the argument. This was hardly prejudicial.

It is perhaps enough to note that Jones's argument is, to paraphrase Cicero, a tempest in a teapot: Judge Brick did not instruct on these two affirmative defenses. Thus, denial of summary adjudication cannot avail Jones here. Nor does the law.

The Court of Appeal recently confirmed the applicable law on review of a denial of summary judgment, in *Safeco Ins. Co. of America v. Parks* (2009) 170 Cal.App.4th 992, 1002-1003: "[E]rror in denying summary judgment 'cannot result in reversal of the final judgment unless that error resulted in prejudice to defendant.' [Citations.] The applicable standard of prejudice is that described in article VI, section 13 of the

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[14] Code of Civil Procedure section 437c, subdivision (f)(1) provides that "[a] party may move for summary adjudication as to . . . one or more affirmative defenses . . . if that party contends that . . . there is no merit to an affirmative defense as to any cause of action . . . . A motion for summary adjudication shall be granted only if it completely disposes of . . . an affirmative defense . . . ."

[15] Affirmative defense number 24 was numbered 23 in the answers filed by Mullinix and Reed and was worded slightly differently.

California Constitution: a judgment cannot be set aside '. . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' (Cal. Const., art. VI, § 13; see *Waller v. TJD, Inc.* [(1993)] 12 Cal.App.4th [830,] 833.)." That rule is a fortiori applicable here, to the denial of summary adjudication. And there was no miscarriage of justice.

Jones generically claims in her opening brief that the court allowed evidence and argument concerning her bad faith, but has cited no evidence that would have been excluded had she received summary adjudication as to affirmative defense number seven. Thus, the fact that Judge Roesch denied summary adjudication as to affirmative defense number seven was of no consequence.

Turning to the 24th affirmative defense, Jones argues that, while California courts have not addressed this issue, numerous other jurisdictions have held that bad faith conduct by an alleged victim of retaliation—for example, manufacturing a retaliation claim—is irrelevant to the issue of liability, that only the motivation of the employer is relevant. We reject the argument, on both procedural and substantive grounds.

As to the procedural basis, in her motion for summary adjudication Jones argued only that affirmative defense number 24 was "without support in the facts." Nowhere did she argue that her motivation was irrelevant to the issue of liability as a matter of law. By failing to make this argument below, Jones waived it on appeal. (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1065-1066; *People v. Partida* (2005) 37 Cal.4th 428, 435 [a party "cannot argue the court erred in failing to conduct an analysis it was not asked to conduct"].) The argument also fails on the merits.

Jones's argument that her motivation in submitting the job applications was irrelevant to her retaliation claim is based primarily on *Shaver v. Independent Stave Co.* (8th Cir. 2003) 350 F.3d 716, 723-724 (*Shaver*), an harassment and retaliation case brought under the American with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213, and Missouri Human Rights Act (MHRA), Mo. Rev. Stat. §§ 213.010-213.137. (*Shaver,*

supra, 350 F.3d. at p. 719.) Plaintiff Shaver, having suffered from epilepsy since his youth, underwent a cranial operation in which part of his brain was removed. Following the procedure, he was able to get a job working at a timber mill. Terminated for insubordination, he sued the mill, asserting various theories, including that his employer had violated the anti-retaliation provisions of the ADA and the MHRA. (*Ibid*.)

The facts showed that Shaver was terminated following an argument with his supervisor. After he filed his lawsuit, Shaver attempted to find a new job, providing his former supervisor's name as a job reference. When contacted, the supervisor told the prospective employers that he could not recommend Shaver because he had " 'a get rich quick scheme involving suing companies.' " Shaver was not offered any of those jobs, and only subsequently found employment after providing the name of a different supervisor as a reference. The district court concluded that Shaver was attempting to manufacture a retaliation claim against his former employer by baiting his supervisor into giving a negative reference, and granted summary judgment in the employer's favor. (*Shaver, supra,* 350 F.3d at pp. 719, 723.)

The Court of Appeals reversed. It explained: "We are unable to agree with the district court's view that claims that are 'manufactured' in the sense that the court used the word are not actionable. The ADA states that 'no person shall discriminate against any individual because . . . such individual made a charge . . . under this chapter.' 42 U.S.C. § 12203(a). A *prima facie* case under this provision consists of proof of protected activity by the employee, adverse action taken by the employer against the employee, and a causal connection between the protected activity and the adverse action. [Citation.] The district court seems to have added an additional requirement, namely, that the party asserting the claim did not purposefully seek the adverse action. Nothing in the words of the statute or in our cases, however, suggests that the conduct of the aggrieved party, other than the party's initial protected activity, is relevant. Rather, the law focuses exclusively on the conduct of the alleged retaliator in determining whether the aggrieved plaintiff has a claim." (*Shaver, supra,* 350 F.3d at pp. 723-724**.**)

The question of whether an employee's motivation is irrelevant has not been addressed by California courts, and we need not answer it here because even if we were to follow the principle enunciated in *Shaver*, we would nevertheless affirm Judge Roesch's ruling. This is so because, as Jones herself acknowledges, her bad faith motivation is relevant to the issue of damages. Thus, denial of summary adjudication was proper, since it may be granted only where it completely disposes of an affirmative defense. (Code Civ. Proc., § 437c, subd. (f)(1); see fn. 14, *ante*.)

2. Motion In Limine No. 3 and Special Jury Instructions Nos. 6 and 8

The second time the issue surfaced was in Jones's motion in limine no. 3, which sought "to preclude testimony regarding plaintiff's good faith in applying for positions when such evidence is not an element of a cause of action for retaliation or failure to take all steps necessary to prevent retaliation [affirmative defense nos. 7 and 24]." During argument on the motion, Jones's counsel clarified that he was "requesting a limiting instruction during the trial that evidence about [Jones's] good faith or that sort of issue in making the applications is not to be considered for the issue about whether there was retaliation but it's only relevant to the issue of damages."

Counsel for the Regents objected that any limiting instruction, if appropriate, should be given with closing instructions rather than as a preinstruction. As to the substance, counsel argued that the evidence would be relevant to show conduct by Jones that "injure[d] her ability to get the job . . . ."

Judge Brick appeared to agree with Jones, observing that "the analysis in *Kyles* [*v. J.K. Guardian Sec. Services, Inc.* (7th Cir. 2000) 222 F.3d 289] and *Shaver*[, *supra*, 350 F.3d 716,] is much more persuasive" than certain district court cases that read Title VII as containing an implied good faith element. He nonetheless denied the motion, apparently anticipating a limiting instruction: "I think that the ruling on the plaintiff's motion in limine number three is to deny it. Whether and what a limiting instruction will say and when can be the subject of meet and confer between counsel over the next week, and you

can have your proposals available for me either as instructions to be given at the closing or as instruction to [be] given at some other point in the trial."

On October 24, 2006, Jones submitted a proposed instruction to be read to the jury prior to opening statements.[16] That same day, the Regents filed an objection to Jones's preinstruction request, arguing as pertinent here: "First, plaintiff did not submit this preinstruction until this afternoon, without providing the parties an opportunity to meet and confer. Second, any limiting instruction is more appropriate as a final jury instruction or as an instruction at the time such evidence is introduced at trial. CACI 206, which plaintiff's preinstruction is based upon, is not included as an introductory instruction." The Regents offered no objection on the merits.

Neither of the parties cites us to a ruling on the preinstruction issue, and we were unable to locate in the record any argument or order on it. Suffice it to say, no preinstruction was given. But this could not be error, as the timing of a limiting instruction is within the trial court's discretion. (*People v. Dennis* (1998) 17 Cal.4th 468, 533-534.)

In addition to the proposed preinstruction, Jones addressed the issue with her proposed special instructions numbers six and eight, both of which concerned her state of mind. Special instruction number six stated, "In your determination of whether

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[16] The proposed instruction read: "During the trial I may explain to you that certain evidence was admitted for a limited purpose. You may consider that evidence only for the limited purpose that I describe, and not for any other purpose. [¶] . . . [¶] In this trial you will also hear testimony that Plaintiff allegedly did not file job applications with Defendant in good faith, that Plaintiff allegedly did not really want jobs she applied for, or that Plaintiff allegedly sought to set Defendant up to retaliate by submitting applications for jobs with Defendant. I will admit this evidence for a limited purpose in this trial. You may not consider this evidence of alleged lack of good faith by Plaintiff in applying for jobs in your determination of whether Defendant engaged in unlawful retaliation. You may not consider this evidence in your determination of whether Defendant failed to take all steps reasonably necessary to prevent retaliation. Evidence of such alleged lack of good faith by Plaintiff in applying for jobs can only be considered by you in your determination of the amount of damages to be awarded to Plaintiff."

Defendant Regents of the University of California subjected Plaintiff Rose Jones to retaliation you are to consider the conduct and motivation of the employees of the University of California. In determining the issue of whether there was retaliation, the *conduct of Rose Jones is not to be considered*, other than her filing charges of discrimination and her year 2000 lawsuit for discrimination and retaliation. In determining whether there was retaliation by Defendant Regents of the University of California the motives of Plaintiff Rose Jones in submitting applications for employment is not a consideration." (Italics added.)

Special instruction number eight stated, "In this trial you may have heard testimony that questioned whether Plaintiff Rose Jones submitted applications for positions with good faith intent in seeking to obtain one or more of the positions for which she applied, or questioned whether Plaintiff Jones was seeking to set up Defendant for another lawsuit by her applications. Under the law, you may not consider any evidence of alleged lack of good faith by Plaintiff in applying for jobs in your determination of whether Defendant engaged in unlawful retaliation. You also may not consider alleged evidence of a lack of good faith in applying for positions in your determination of whether Defendant failed to take all steps reasonably necessary to prevent retaliation. Under the law as I have instructed you, in determining whether Plaintiff Jones was subjected to retaliation, it is the motive and intent of Defendant, acting through its employees, that is relevant in determining whether Defendant Regents subjected Plaintiff Jones to retaliation. Any alleged evidence of a lack of good faith by Plaintiff Jones in applying for jobs can only be considered by you in your determination of the amount of damages to be awarded to Plaintiff."

As noted above, Judge Brick had issued a comprehensive order entitled "instructions and tentative rulings on proposed jury instructions." As pertinent here, he indicated that as to Jones's special instruction number six, he would give only the last sentence. As to special instruction number eight, he stated that his ruling was yet to be determined, but explained, "As phrased, this is not a correct statement of the law. Even

assuming that *Shaver* . . . and *Kyles* . . . would be followed in California, *Shaver*, a negative reference case, stands for the proposition that a plaintiff's interest or motive in seeking a job is not relevant to liability, but only to damages. It does not hold that plaintiff's conduct, as may be shown by the manner in which the application is submitted as distinguished from the plaintiff's motive for submitting it, is not relevant to determining whether a negative decision was made because of a retaliatory motive. *Kyles*[] held that employment testers, like housing testers, have standing to pursue a Title VII claim. It does not involve questions about whether the testers presented themselves in the best possible light."

On December 5, 2006, a lengthy hearing was held on the jury instructions. As pertinent here, Judge Brick ruled that "[t]here will be no separate instructions on the issue of unclean hands or bad faith." He would "follow the line of authorities that says that if it is not an element of her case to establish that she intended to take the job—or jobs—in order to be able to sue for retaliation. It is, however, directly relevant to what, if any, damages she is entitled to."

As noted above, " 'A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence.' " (*Major v. Western Home Ins. Co., supra,* 169 Cal.App.4th at p. 1217.) However, it incumbent upon the party to submit legally correct instructions. (*Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 547-548.) Jones's special instructions numbers six and eight were not correct statements of the law.

Jones cites no authority, and we are aware of none, supporting the proposition that the jury could in no way consider "the conduct of Rose Jones" when evaluating her claim. Neither *Shaver*, *Kyles*, nor any other authority cited by Jones stands for this rule. To the contrary, the manner in which Jones completed her applications was "conduct." So, too, the way she presented herself. And also the fact that, if successful, she would

have two jobs, necessitating that the University pay overtime. All this could necessarily be considered.

Further, refusal to give either of Jones's proposed instructions could not be reversible error, where the subject matter of the refused instruction is "substantially covered by the instructions given." (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists, supra,* 227 Cal.App.2d at p. 719.) This was the case here. In fashioning his own retaliation instruction, Judge Brick included an additional clause, as a result of which the final element of the instruction read, "For purposes of establishing whether or not retaliation occurred, it does not matter whether Rose Jones had a real and bona fide interest in the job applied for." In short, the jury was advised that Jones's motivation in submitting the job applications was not relevant to whether the Regents retaliated against her.

Finally, this point was hammered home by Jones's counsel, who argued that Jones's motives were not at issue—only the conduct of the Regents. In his words:

"What does the court—not me, not Mr. Lafayette—what does the court tell you about this issue? It's right here.

"For the purpose of establishing whether or not retaliation occurred, it does not matter whether Rose Jones had a real and bona fide interest in the job applied for. That's your jury instruction. [¶] . . . [¶]

"Now why would the law be this way, to avoid exactly the sort of thing we heard in the closing argument. Blame the victim. Blame the person who is going forward.

"What does the instruction focus on? It focuses on why is the defendant doing what they did? Why did the defendant take these actions? Was there training to teach people not to retaliate?

"The law wants you to focus on why the defendant has done things, and the instructions tell you that the focus is not on where Mr. Lafayette tried to put it yesterday and today, on why Rose Jones is doing what she does." There was no error.

D. The Motions for Partial JNOV and New Trial Were Properly Denied

Jones's third argument asserts that Judge Brick erred in denying her motions for partial JNOV and new trial. Jones is wrong.

In her JNOV motion, Jones argued that judgment for the Regents should be set aside and entered in her favor because the "uncontroverted" evidence established that her prior lawsuit against the Regents was the motivating factor in the Regents taking two adverse employment actions against Jones. Specifically, Jones contended that Bouchereau admitted that Jones's prior participation in the lawsuit against the Regents was the reason Bouchereau undertook successful efforts to block Jones from reaching the interview stage for the CRE position. Jones also contended that Rosewood admitted she declined to give Jones a positive reference for the proctor position because Jones had previously sued the University and certain employees for discrimination. This, according to Jones, was conclusive and "uncontradicted" evidence that her protected activity of suing the Regents for discrimination was a motivating factor for adverse employment actions taken against her. In light of these "admissions," Jones argued, there was no evidence supporting the jury's finding that her prior lawsuit was not a motivating reason for the adverse employment actions taken by the Regents against her and judgment should be entered in her favor.

As pertinent here, Jones's motion for new trial was similar, reiterating the arguments presented in her JNOV motion concerning the testimony of Bouchereau and Rosewood, again claiming that their "admissions" established that Jones's prior lawsuit was a motivating reason for their adverse employment actions.

Following argument, Judge Brick entered orders denying both motions. As to the motion for JNOV, he rejected Jones's claim that the testimony of Bouchereau and Rosewood established that there was no substantial evidence to support the jury's finding that Jones's prior discrimination lawsuit was not a motivating factor for the Regents' adverse employment action. He explained why in great detail:

"With respect to Rosewood's testimony concerning the Proctor position, Plaintiff misreads Rosewood to say that it was because of the prior lawsuit that she declined to give a reference. However, the jury could find, based upon all of Rosewood's testimony that the lawsuit, per se, was not a motivating factor in her decision. Rather, the jury could find that it was the nature of Jones' claims against Anita Diaz and others which caused Rosewood to doubt Jones, and thus not be able to give her a 100% positive reference anymore. Plaintiff has cited no authority for the proposition that if someone declines to provide a reference because of honest doubts about a candidate formed from charges made by that candidate against others, the candidate is nonetheless entitled to a positive reference. On this record, the jury could find that Plaintiff failed to carry her burden of proof with respect to Rosewood's alleged retaliatory motivation for not providing a reference for the Proctor position.

"With respect to Bouchereau's testimony concerning the Coordinator for Residential Education ('CRE') position, Plaintiff argues that Bouchereau acted upon her understanding that she had been directed not to advance Jones to the interview stage. However, there are inconsistencies between the testimony of Bouchereau and Chase about what Chase said to Bouchereau. Indeed, Bouchereau was not entirely consistent about what Chase said in different parts of her own testimony. The jury was entitled to believe Chase when she testified that she gave no directions to Bouchereau concerning Jones. Given the inconsistencies in Bouchereau's testimony, the conflicts between her testimony and the testimony of Chase and Arlene Mejia, her demeanor on the witness stand, and the evidence of bias she had toward the University and Chase, the jury was entitled to disbelieve Bouchereau's testimony as to her motivation for her behavior toward Jones. Further, Bouchereau was the chair of a three-person selection committee for the CRE position. Another member of the committee, Arlene Mejia, testified that the members of the committee had concerns regarding the information in Plaintiff's application. All three members of the committee decided that Plaintiff would not move forward, yet there was no evidence that two were privy to whatever was said between

Chase and Bouchereau. On this record, the jury could find that Plaintiff failed to carry her burden of proof with respect to an alleged retaliatory motivation for not advancing her to the interview stage for the CRE position."

As to the motion for new trial, Judge Brick ruled as follows: "With respect to Plaintiff's contention that the verdict is against the law (CCP §657(6)), Plaintiff relies upon her JNOV argument. For the same reasons as those stated in the order denying that motion, the Court rejects that argument in the context of this motion for a new trial."[17]

Jones now challenges Judge Brick's denial of both motions, but on just one ground. In her words, "The trial court failed to afford Jones the absolute protection provided by the participation clause of the FEHA when it denied Jones's motion for JNOV and new trial and held that Rosewood's doubts regarding the merits of the prior Jones lawsuit could be considered in reaching a decision as to whether or not there was retaliation." Such contention fails.

Initially, we note that Jones's framing of the issue is factually inaccurate, misstating Judge Brick's ruling and Rosewood's testimony. As quoted above, Judge Brick did not state that he was relying on Rosewood's testimony that her refusal to provide a reference was based on her doubts about the merits of Jones's underlying lawsuit. Nor did Rosewood so testify. We also strongly reject Jones's assertion that Judge Brick had "a misunderstanding of the fundamental protection afforded" by FEHA. And we disagree with Jones's contention, citing *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799, that we must conduct an independent review of Judge Brick's rulings because the issue is one of law.

The correct standard of review on the JNOV motion is this: We review denial of a JNOV motion to determine whether there is any substantial evidence supporting the jury's verdict. If there is, we must affirm the denial of the motion. (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1138; accord, *Trujillo v. North*

[17] Judge Brick also rejected Jones's new trial motion on additional grounds not relevant here.

County Transit Dist. (1998) 63 Cal.App.4th 280, 284.) As set forth above, there was. Plenty.

As to the denial of a motion for new trial, the law is that: " '[a] trial judge is accorded a wide discretion in ruling on a motion for new trial and [] the exercise of this discretion is given great deference on appeal. [Citations.] However, we are also mindful of the rule that on an appeal from the judgment it is our duty to review all rulings and proceedings involving the merits or affecting the judgment as substantially affecting the rights of a party [citation], including an order denying a new trial. In our review of such order *denying* a new trial, as distinguished from an order *granting* a new trial, we must fulfill our obligation of reviewing the entire record, including the evidence, so as to make an independent determination as to whether the error was prejudicial.' . . . Prejudice is required: '[T]he trial court is bound by the rule of California Constitution, article VI, section 13, that prejudicial error is the basis for a new trial, and there is no discretion to grant a new trial for harmless error.' [Citation.]" (*Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152, 1160.) In sum, we "determine whether the court abused its discretion by examining the entire record and making an independent assessment of whether there were grounds for granting the motion." (*ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 832.)

We have conducted an independent view of the record and conclude that there was ample evidence to support the jury's finding that the University did not take an adverse employment action against Jones with a retaliatory motivation. Rosewood's testimony, the primary focus of this issue on appeal, supports a jury finding that she did not act with retaliatory animus when she declined to provide a reference for Jones. As explained in great detail above, Rosewood offered two different explanations for her reticence in providing a reference for Jones. First, she felt that the manner in which Jones completed her application, including unnecessary information about her prior lawsuit and the ensuing settlement, reflected poorly on her judgment. Second, Rosewood felt caught in the middle between Jones and the people whom Jones had previously sued, people for

whom Rosewood had great respect. The jury could readily conclude, as Judge Brick so well articulated it, that Rosewood's decision was driven by a non-retaliatory motive. In sum, Judge Brick considered the argument, read all the papers, and weighed all the evidence. He manifestly exercised his discretion in denying plaintiff's new trial motion. There was no error.

E. The Record Does Not Warrant A New Trial

Jones's last argument, set forth in less than a page, contends that the "entire record . . ., after independent determination, warrants a new trial." Since the record does not contain any, let alone all, of the errors Jones asserts, the argument necessarily fails.

DISPOSITION

The judgment is affirmed.

_____
Richman, J.

We concur:

_____
Kline, P.J.

_____
Haerle, J.